No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

GEORGE MICHAEL SHIPSEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a federal criminal defendant entitled to an instruction presenting his factually-supported, claim-of-right defense to the jury in a case charging statutory crimes derived from common law antecedents – theft or embezzlement from an employee benefit plan, mail fraud, and wire fraud – where he had such entitlement at common law?

2. Does 18 U.S.C. § 3288 permit a district court to reinstate charges it had previously dismissed pursuant to the Speedy Trial Act where such reinstatement was unauthorized by the applicable statute of limitations?

3. May a court, employing an "economic reality" theory, judicially expand the scope of 18 U.S.C. § 664, which criminalizes theft or embezzlement from employee benefit plans, to reach conduct which did not steal from, but which indirectly resulted in a loss to, such plans?

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OPINIONS BELOW

The published opinion of the Ninth Circuit Court of Appeals affirming the judgment of the district court is reported at *United States v. Shipsey*, 363 F.3d 962 (9th Cir. 2004) and appears at Appendix A. The Ninth Circuit's previous published opinion in the case is reported at *United States v. Shipsey*, 190 F.3d 1081 (9th Cir. 1999).

The district court issued orders denying defendant's motion to dismiss (App. B) and for new trial (App. C), both of which are unreported.

JURISDICTION

On April 9, 2004, the United States Court of Appeals for the Ninth Circuit entered its judgment; an amended judgment was entered on May 12, 2004. On June 23, 2004, the court entered an order denying Shipsey's timely petition for rehearing. On July 27, 2004, the court entered an order recalling its mandate and staying issuance of the mandate pending the filing of Shipsey's petition for writ of certiorari on or before Sept. 21, 2004. On September 8, 2004, this Court extended the time for the filing of the petition to October 21, 2004.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 664 provides:

§ 664. Theft or embezzlement from employee benefit plan

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined under this title, or imprisoned not more than five years, or both.
>
> As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974 [29 U.S.C.A § 1001 et seq.].

18 U.S.C. § 1341 provides:

> § 1341. Frauds and swindles
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the

direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343 provides:

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 3288 provides:

§ 3288. Indictments and information dismissed after period of limitations

Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes

> final, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations. This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process

for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The district court had jurisdiction over this criminal matter under 18 U.S.C. § 3231.

A. Procedural History

On April 22, 1998, following jury trial, a judgment of conviction was entered against defendant George Michael Shipsey on seven counts of theft from an employee benefit plan subject to the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") in violation of 18 U.S.C. § 664 and two counts of money laundering in violation of 18 U.S.C. § 1957. The jury had been unable to reach verdicts on nine counts charging mail fraud (18 U.S.C. § 1341) and four counts charging wire fraud (18 U.S.C. § 1343), as to which the district court declared a mistrial. The court had also dismissed two money laundering counts prior to their submission to the jury. On Shipsey's initial appeal, the Ninth Circuit reversed the convictions on all counts and remanded the matter to the district court for a new trial. *United States v. Shipsey*, 190 F.3d 1081 (9th Cir. 1999).

On October 24, 2000, the district court dismissed, on speedy trial grounds, the thirteen mail and wire fraud charges as to which the jury had been unable to reach a verdict at Shipsey's first trial. On November 2, 2000, the government obtained a superseding indictment which recharged eight of the nine mail fraud counts contained in the original indictment, the same four wire fraud counts, the same seven counts charging theft from an employee

benefit plan, and the same two money laundering charges which had survived the earlier dismissal.

Following the filing by the defendant of a motion to dismiss the superseding indictment based, *inter alia*, on the statute of limitations – presaging the second of the questions presented herein – the district court, on February 14, 2001, denied the motion to dismiss on limitations grounds as to the twelve wire and mail fraud counts and four of the charges of theft from an employee benefit plan, but granted dismissal of the remaining three counts of theft from an employee benefit plan and the two counts charging money laundering. App. C at 42-49.

Shipsey's second jury trial commenced on May 7, 2002. On May 20th, the court denied Shipsey's motion to dismiss the charges of theft from an employee benefit fund made on the grounds that the government's case on those charges relied on an uncharged theory of liability while failing to establish the theory charged in the indictment – the predicate of the instant petition's third question. On May 23rd, the jury returned verdicts of conviction on the extant sixteen counts.

On October 4, 2002, the district court denied Shipsey's motion for a new trial based, *inter alia*, on statute of limitations and constructive amendment grounds – again, the second and third questions presented herein – issuing on October 8th an opinion in support of its ruling. App. B at 24-38. On December 13, 2002, Shipsey was sentenced to a term of thirty months on each count, all terms to run concurrently with one another. On December 16, 2002, the court issued a judgment and order of commitment. The court issued an amended judgment on March 18, 2003.

The Ninth Circuit affirmed the judgment in a published opinion issued on April 9, 2004 and amended on

May 12, 2004. App. A at 1-23. Shipsey thereafter filed a timely petition for panel rehearing and suggestion for rehearing en banc, which the Ninth Circuit denied in an order filed on June 23, 2004. App. D at 50. The mandate in the case issued on July 1, 2004, but was later recalled and a stay of mandate granted on July 27, 2004 in order to permit Shipsey to file the instant petition for a writ of certiorari.

B. Underlying Facts

The case arose out of an alleged diversion of construction funds by Shipsey, acting as a general contractor on a 122-unit condominium project known as Stonefield in Santa Rosa, California. Shipsey was one of three general partners in a limited partnership which was formed in late 1987 to develop Stonefield. In July 1988, the limited partnership hired Shipsey to operate as the general contractor for constructing Stonefield. As general contractor, Shipsey was to receive a fee that was based upon a percentage (5%) of the total construction costs. In the same time frame as he was performing his duties as Stonefield's general contractor, Shipsey was also building a residence for himself on Obertz Lane in Novato, California ("Obertz"). As the Ninth Circuit summarized it, "the crimes charged in this case arose from Shipsey's using money loaned to the partnership to build Stonefield to pay unpaid debts to subcontractors for the construction of the Obertz mansion." App. A at 4.

> Shipsey sought financing for Stonefield from McMorgan & Co. McMorgan acted as investment manager for several union pension funds, including four at issue here, those of the Carpenters, Operating Engineers, Plasterers, and Sheet Metal Workers unions (collectively "the Pension Funds"). Shipsey met with McMorgan's vice-president,

Michael Fry. Through Fry, the government established Shipsey's knowledge that the lenders on the project would be union pension trust funds. Fry committed the Pension Funds to a $19 million loan to fund the Stonefield project.

Rather than drawing loan proceeds directly from the Pension Funds, the partnership signed its loan agreement with First Cal, a company associated with McMorgan. First Cal then sold the note to the Pension Funds, pursuant to a previously executed agreement. The construction loan agreement that Shipsey signed specifically provided that First Cal would sell the indebtedness to ERISA governed pension funds. First Cal serviced the loans. It made disbursements to the partnership out of its own funds, via a line of credit it maintained at American Security Bank. First Cal was then reimbursed from the Pension Funds, subject to McMorgan's approval.

To obtain draws on the loan, Shipsey was required to submit draw requests as it received bills from subcontractors and suppliers. Another company employed by First Cal, Project Control, prepared reports on the progress of the project and reviewed the draw requests. First Cal and McMorgan also had to review and approve the draw requests. Once McMorgan gave the final okay, First Cal issued loan proceeds in the form of two-party checks, made payable to both the partnership and the subcontractor or supplier. First Cal then submitted its requests for reimbursement to McMorgan, which authorized wire payment transfers from the pension funds to First Cal's account at American Security Bank.

Trial evidence demonstrated that portions of the loan advances were diverted from the Stonefield project to pay bills incurred by Shipsey in building

> the Obertz residence. Several subcontractors on the Stonefield project also worked at Obertz. Shipsey directed his office staff to include Obertz invoices in the Stonefield draw requests. In addition, Shipsey made agreements with subcontractors who were owed money on Obertz to increase the prices invoiced on Stonefield work – and paid from the loan proceeds – thereby folding the Obertz debts into the cost of building Stonefield. Within months of the start of construction at Stonefield, First Cal expressed concerns over cost overruns. By April 1989, it determined that the amount of the remaining loan funds would be insufficient to complete construction. In December 1989, it declared the loan in default. Nonetheless, it continued funding draw requests until at least March 1990. By July 1990, all funding and construction ceased and the pension funds began foreclosure.

App. A at 4-5.

The defense theory of the case challenged the allegation of criminal intent, maintaining that Shipsey had been entitled to the requested sums because the only material condition to payment was completion of a given percentage of work at Stonefield, and that payments were only made when Project Control, the company hired by First Cal to inspect the progress of the construction, had independently verified the percentage of completion. He contended that his belief in such entitlement constituted a defense to all of the charges brought against him.

On this point, Terry Jensen, the Project Control employee assigned to Stonefield, testified that Project Control undertook the responsibility to determine if a draw request was warranted by ascertaining the percentage of completion and providing a report, including photographs

and a line-item-by-line-item analysis. RT 1039, 1082-86. First Cal then responded to Project Control's percentage of completion analysis and recommendation whether payment was warranted. RT 1082.

The evidence was uncontradicted that Shipsey had no influence over Project Control's determination as to the percentage of completion. RT 1042, 1065. Jensen produced a report that the quality of work on Stonefield was better than average and that the project was progressing rapidly. RT 1066. Jensen stated that he analyzed the subcontracts and concluded that they all seemed reasonably priced and that the amount of materials was in line with the size of the project. RT 1110.

The defense also introduced evidence showing that, based on the estimates of completed items at Stonefield, the amounts budgeted for each item, and the amounts actually advanced by First Cal, Shipsey in most instances had actually completed *more* of the work at Stonefield than First Cal had paid for. RT 1101, Ex. 88 (Project Control report estimating final percentage of work completed by line item); RT 1831-85. The government made no serious attempt to dispute that contention, but instead chose to characterize it as irrelevant to proof of the charges against Shipsey. RT 2053 (prosecutor's closing argument).

REASONS FOR GRANTING THE PETITION

Rule 10(c) of the Rules of the Supreme Court identifies the following as a compelling reason why this Court may choose to review a decision of a United States court of appeals on certiorari:

> When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

See also Schlude v. Commissioner, 372 U.S. 128, 130 (1968) (certiorari granted where court of appeals has misapplied or misconstrued relevant Supreme Court precedent).

The Ninth Circuit Court of Appeal's decision in this matter plainly implicates the criteria set forth in Rule 10(c). In its opinion below, it upheld the effective denial of a claim-of-right defense to federal offenses defined in terms derived from common law antecedents, though a defendant was entitled to such a defense at common law. By permitting a jury to convict the defendant based merely on his intent to deceive and not defraud, the court of appeals contravened this Court's teachings as to the proper construction of federal criminal statutes derived from common law origins. The importance of this issue lay, *inter alia*, in its widespread impact, implicating as it does an inadequate model instruction employed throughout the Ninth Circuit, as well as the proper construction of several, common-law-derived federal crimes – mail and wire fraud and theft or embezzlement from an employee benefit plan – which are oft-utilized weapons in the government's prosecutorial arsenal.

The court of appeals' error in construing 18 U.S.C. § 3288 to permit reindictment following a dismissal for a Speedy Trial Act violation after the applicable statute of limitations had already run undermines the protections afforded defendants against undue delay in being brought to trial. The question of whether the statute's language –

which bars reindictment where the reason for the earlier dismissal "would bar a new prosecution" – encompasses a dismissal on speedy trial grounds should not have been answered in favor of a dilatory government at the expense of a criminal defendant. The relevant language was added to the statute in 1988, and this Court has not been heard as to its proper construction. The reading adopted by the Ninth Circuit is in direct tension with this Court's long-standing teaching to interpret statutes of limitation liberally in favor of defendants and repose.

Finally, the appellate court's error in permitting defendant to be convicted of theft from an employee benefit plan even though the funds at issue came from a general financial institution – and only indirectly through transfers from employee benefit plans within the scope of 18 U.S.C. § 664 – also carries broader implications. The court of appeals again discarded longstanding rules of statutory construction in the penal context to broaden a criminal statute's ambit to unjustifiably reach conduct not covered by the statute's plain language. Although the specific error in this case was the improper rejection of defendant's constructive-amendment claim – the indictment charged a direct theft from a statutorily-covered plan, but the instructions permitted a conviction on an indirect transfer theory, the only theory proven – it is the expansive construction of the statute inherent in that ruling that counsels in favor of this Court's intervention. Moreover, the Ninth Circuit decision created both an intercircuit (*United States v. Furst*, 886 F.2d 558, 565 (3rd Cir. 1988) ("if the government did not produce evidence from which the jury could conclude that the account from which funds were embezzled was an ERISA account, [defendant's] motion for acquittal on the section 644 charges should have been granted")) and an intracircuit

(*United States v. Rodrigues*, 159 F.3d 439, 448 (9th Cir. 1998) ("Embezzlement requires that the property taken be owned by the victim, not owed to the victim.")), conflict, factors that should also militate in favor of this Court's granting certiorari.

I. THE NINTH CIRCUIT IS APPLYING A MODEL INSTRUCTION ON INTENT TO DEFRAUD THAT IS INADEQUATE TO INSTRUCT THE JURY ON WHAT SHOULD BE A PERMITTED DEFENSE OF CLAIM OF RIGHT

A. Procedural Facts

At trial, defense counsel submitted two instructions on his defense of good faith. The instant petition centers on the denial of the second of these proposed instructions, which stated:

> It is a defense to the instant charges that Mr. Shipsey possessed a good faith belief that he was in fact entitled to the funds he obtained. The burden is on the prosecution to prove beyond a reasonable doubt that he did not possess such a belief and acted with the intent to defraud. *If after consideration of all of the evidence in this matter you have a reasonable doubt that Mr. Shipsey did not possess such a good faith belief that he was entitled to the funds obtained*, then you must acquit Mr. Shipsey.

(Emphasis added.) In an instructional conference the day before closing arguments, defense counsel specifically contended that Shipsey's good faith would preclude a finding of specific intent so long as he believed in his entitlement to payment under the contract. RT 1931-33, 1940-41, 1943-46. After extensive discussion on the point (RT 1931-48), the trial court agreed to modify the model

instruction by permitting the jury to consider Shipsey's good faith belief that the disbursements were "authorized," but declined any modification incorporating his entitlement theory. RT 1934, 1939, 1946; *see also* RT 2010.

Consequently, the trial court at no time informed the jury that a finding of Shipsey's good faith belief in his entitlement to the funds was inconsistent with a finding of intent to defraud. Instead, the trial court's final good faith instruction, read in connection with all counts, simply stated:

> In determining whether or not the defendant acted with an intent to defraud, you may consider whether or not the defendant had a good-faith belief in the truthfulness of the representations made by him or a good faith belief that the disbursements were authorized.

RT 2139, 2142, 2144.

B. The Ninth Circuit's Ruling

The Ninth Circuit's disposition of Shipsey's claim of error was terse. Citing a series of that circuit's opinions, the court held that "where [a] district court provides adequate instruction on [the] specific intent element of mail fraud, [an] instruction that 'good faith was a complete defense' was not required." *Shipsey*, 363 F.3d at 967. The court concluded:

> There can be little doubt that the court correctly defined intent. Its charge – that intent to defraud is an intent to deceive or cheat – comes directly from Ninth Circuit Model Criminal Jury instructions § 3.17 . . . As the district court defined intent to defraud, no good faith instruction was necessary at all, and certainly not the defendant's specific instruction.

Id. at 967-68.

Thus, the court did not directly address Shipsey's core argument as to why the pattern instruction was inadequate, namely, that it failed to permit the adequate presentation of his "claim of right" defense. The district court's instruction permitted a conviction where the government could only prove an intent to deceive, a defendant could have such intent because of his belief in his entitlement to the monies or property at issue without having the requisite intent to defraud, and the Ninth Circuit's decision failed to address this core problem.

C. The Ninth Circuit Pattern Instruction Is Inadequate and Misleading in a Case in Which a Defendant's Good-Faith Defense Rests on a Claim of Right to the Property He Is Alleged to Have Taken by Fraud, Because, in Such an Instance, an Intent to Deceive Does Not Establish an Intent to Defraud

As the Ninth Circuit noted, that circuit's pattern instruction on fraud, as given by the district court below, defines an intent to defraud as "an intent to deceive or cheat." Because the definition is in the disjunctive, under that instruction a jury may find an intent to defraud fully established by an intent *either* to deceive *or* to cheat. In other words, one who deceives necessarily intends to defraud. In a case such as the instant one, in which a good faith defense rests on a claim of right, that definition of fraud is misleading at best and flatly wrong at worst. Simply put, an intent to deceive on the part of one who seeks to obtain property to which he believes he is entitled is not, *ipso facto,* an intent to defraud, nor is it inconsistent with the mental state of good faith.

This Court has recognized that common law principles *must* inform the meaning of both "fraud" as used in the mail fraud statute (*Neder v. United States*, 527 U.S. 1, 23, n.7 (1999)) and "steal" as used in statutory crimes such as that set forth in 18 U.S.C. § 664 (*Morissette v. United States*, 342 U.S. 246, 263 (1952) (construing 18 U.S.C. § 641 [stealing government property])). Absent contrary direction from Congress, the various forms of fraud and theft proscribed by the statutes at issue in this case must be read to retain their common law meanings. *See Morissette*, 342 U.S. at 263. As this Court eloquently put it, "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Id.* The Ninth Circuit decision is wrong in light of this precedent.

The common law's "cluster of ideas" precludes a finding of fraudulent intent where the accused harbors a good faith belief in his lawful entitlement to the property taken. *See* 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.7 (False Pretenses) subsection (f)(2) (2nd ed. 1986, updated to 2003) (footnotes omitted). The common law recognized that one who believes in his right to property does not act with an intent to defraud *even if he uses deception to take possession of it*:

> As with the analogous theft crimes, larceny and embezzlement, *one who tells intentional lies nevertheless is not guilty of false pretenses, because he lacks the intent to defraud*, if (1) he honestly but erroneously believes the property obtained is his own property or is otherwise property to

> which he has a lawful right; or . . . (3) he obtains it in satisfaction of a debt which the other actually owes (or, it would seem, a debt which he honestly but erroneously believes the other to owe him).

Id. (emphasis added).

Here, neither the Ninth Circuit's pattern instruction nor the instruction given by the district court was adequate to inform the jury of the nature of the claim of right defense upon which Shipsey was relying. As noted, the language of the pattern instruction necessarily equates an intent to deceive with an intent to defraud, an equivalence which is inaccurate (*cf. United States v. Yermian*, 468 U.S. 63, 73 (1984) (distinguishing between intent to defraud and intent to deceive); *United States v. Jimenez*, 77 F.3d 95, 97 (5th Cir. 1996) ("Intent to defraud requires an intent to (1) deceive, *and* (2) cause some harm to result from the deceit.") (emphasis added)), and prejudicially so in a claim-of-right case.

The trial court's instructions herein simply permitted the jury to consider whether Shipsey believed the challenged disbursements were "authorized" in making its determination whether he acted with criminal intent. This instruction had no relevance to the facts adduced in this case and could not compensate for the court's failure to present Shipsey's proposed instruction. As reflected in that instruction ("It is a defense to the instant charges that Mr. Shipsey possessed a good faith belief that he was in fact entitled to the funds he obtained."), Shipsey never contended that his good faith defense rested on a belief that the fund beneficiaries or administrators had authorized the challenged disbursements. Rather, his defense was, and expressly so, that he believed in good faith that he

was entitled to receive the payments based on his completion of the various phases of Stonefield's construction.

In this case, the Ninth Circuit's pattern instruction on an intent to defraud was not adequate to protect a defendant's Sixth Amendment right to present his version of the facts and his concomitant right to have proposed "theory of the defense" instructions submitted to the jury, whenever they are supported by the law and the evidence. *Conde v. Henry*, 198 F.3d 734, 740 (9th Cir. 2000).

This Court has not settled the important question of whether a criminal defendant has the right to have the jury instructed that a good faith belief that he was entitled to the funds he obtained constitutes a complete defense to charges of wire and mail fraud and theft from an employee benefit plan, regardless of whether he undertook any particular actions with an intent to deceive. In the absence of such settlement, some lower federal courts have contravened this Court's teaching in *Morissette v. United States*, 342 U.S. 246, 263 (1952), namely, that, in construing federal criminal statutes importing common law terms of art, "judicial initiative" must not strip defendants of benefits derived at common law absent express contrary direction from Congress. *See, e.g., United States v. Gole*, 158 F.3d 166, 168 (2nd Cir. 1998) (rejecting claim of right defense to mail fraud prosecution); *United States v. Casey*, 951 F.2d 892, 894 (8th Cir. 1991) (holding victim's debt to defendant in excess of the amount obtained by defendant through fraud is irrelevant to mail fraud liability).

The Ninth Circuit decision in this case is of a piece with those decisions. The court's reliance on its pattern intent instruction, to the exclusion of Shipsey's proposed instruction, effectively precluded his presentation of the claim of right defense to which he was lawfully entitled.

Defendants with such claim-of-right defenses should be permitted to present such defenses to federal offenses derived from the common law.

II. THE NINTH CIRCUIT HAS CONSTRUED 18 U.S.C. § 3288 OVERLY BROADLY SO AS TO PERMIT, IN THE ABSENCE OF EXPRESS CONGRESSIONAL AUTHORIZATION, THE REINSTATEMENT OF CHARGES DISMISSED ON SPEEDY TRIAL GROUNDS AFTER THE LIMITATIONS PERIOD HAD EXPIRED, THEREBY EXCUSING THE GOVERNMENT'S UNDUE DELAY

A. Procedural Facts

Defendant was indicted on Counts One to Twelve, which alleged mail and wire fraud offenses no more recent than August 10, 1990, by means of a superseding indictment returned on November 6, 2000. These counts had earlier been dismissed without prejudice on October 30, 2000 due to a violation of the Speedy Trial Act. On their face, these twelve counts were outside the applicable five-year statute of limitations found in 18 U.S.C. § 3282. The issue presented is whether Counts One to Twelve come within the ambit of 18 U.S.C. § 3288, which provides a six-month grace period when indictments charging a felony are "dismissed for any reason after the period prescribed by the applicable statute of limitations has expired" except where the dismissal was for "the failure to file the indictment . . . within the period prescribed by the applicable statute of limitations, or for some other reason that would bar a new prosecution."

B. The Ninth Circuit's Ruling

The court of appeals in this case ruled that "where as here, the original indictment was timely returned, § 3288 allows reindictment within the grace period, where a Speedy Trial Act dismissal after the statute of limitations' expiration is without prejudice." *Shipsey*, 363 F.3d at 971.

In so holding, the court overruled its own prior ruling to the contrary. In 1987, the Ninth Circuit had held that the six-month grace period provided under a previous version of 18 U.S.C. § 3288 (permitting such grace period whenever an indictment had been dismissed as "defective or deficient for any cause") does not apply to dismissals for violation of the Speedy Trial Act. *United States v. Peloquin*, 810 F.2d 911, 912 (9th Cir. 1987) (Kennedy, J.).

C. The Ninth Circuit's Construction of Section 3288 to Permit Reinstatement of Charges Dismissed on Speedy Trial Grounds Following the Expiration of the Limitations Period Is Far Too Forgiving of Undue Government Delay and Inconsistent With This Court's Interpretation of Limitations Issues

The language of the present version of section 3288 – which provides a six-month grace period for refiling felony charges when indictments are "dismissed for any reason after the period prescribed by the applicable statute of limitations has expired" – does *not* mean *all reasons*. According to the statute's last sentence, it "does not permit the filing of a new indictment . . . where the reason for the dismissal was the failure to file the indictment . . . within the period prescribed by the applicable statute of limitations, *or for some other reason that would bar a new*

prosecution." Thus, section 3288 mandates that a six-month grace period from the statute of limitations is permitted following a dismissal for any reason except for those reasons which "would bar a new prosecution." The Ninth Circuit had previously construed this "some other reason" language of the amended version of section 3288 to refer to a "defect [which] is not capable of being cured." *United States v. Clawson*, 104 F.3d 250, 252 (9th Cir. 1996).

Both the language of the present version of section 3288 and of the *Clawson* decision beg, rather than answer, the question presented to the court of appeals: is a Speedy Trial Act violation one of the "other reason[s]" for dismissal that bars reprosecution because it is a "defect [which] is not capable of being cured?" The statute's plain language should have compelled an affirmative answer. Just as an inmate who has spent time in prison before being exonerated by DNA testing cannot be given back his time, a defendant who has been subject to the government's undue delay in bringing him to trial cannot be given back his waiting time. There is no cure for his lost time. Moreover, in *Peloquin*, the Ninth Circuit, construing the earlier version of the statute, had held that a dismissal for a violation of the Speedy Trial Act was indeed a "reason that would bar a new prosecution." There is nothing in the language of the statute's amended version which states, plainly or otherwise, that, contrary to *Peloquin*, the six-month grace period provided by the statute applies following a dismissal for speedy trial reasons. Had Congress intended that a Speedy Trial Act violation not be deemed a "reason that would bar a new prosecution," it could easily have said so.

It is anomalous indeed to reward the government for its failure to comport with Speedy Trial Act deadlines by extending the already liberal statue of limitations. Both the statute of limitations and the Speedy Trial Act are designed to protect a defendant from undue delay by the government in bringing a citizen to trial. It certainly makes sense to conclude that when the government has indicted a defendant near the expiration date of the statute of limitations, it must take special care to ensure that it respects the requirements of the Speedy Trial Act, for a failure to do so would illegally delay an already much-delayed trial. If the government does indeed deny the defendant the speedy trial to which he is statutorily entitled after the limitations period has run, it is entirely fair to subject it to the consequences that accompany indicting a defendant outside the limitations period. The Ninth Circuit refused to do so in the absence of a clear legislative directive.

"Th[is] Court has indicated that criminal statutes of limitation are to be liberally interpreted in favor of repose." *United States v. Marion*, 404 U.S. 307, 323 n.14 (1971). The Ninth Circuit's ruling is to the precise opposite effect.

III. THE NINTH CIRCUIT'S ADOPTION OF AN "ECONOMIC REALITY" THEORY OF ERISA-FUND THEFT IN ORDER TO REJECT DEFENDANT'S CLAIM OF CONSTRUCTIVE AMENDMENT RADICALLY EXPANDS THE SCOPE OF 18 U.S.C. § 664 TO REACH PENSION FUND LOSSES BEYOND THOSE DELINEATED IN THE STATUTE

A. Procedural Facts

Counts Thirteen to Sixteen of the Indictment alleged violations of 18 U.S.C. § 664, the theft of money or property

from an employee benefit plan operated by four unions. On their face, these counts stated offenses under section 664, in that each alleged that defendant Shipsey "did embezzle, steal and unlawfully abstract and convert to his own use and the use of another, the monies, funds, credits, property and other assets" of a Pension Trust Fund which was "an employee benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974, and a fund connected therewith."

Furthermore, Paragraph Six of the Indictment, which was incorporated by reference into all four of the section 664 charges, alleged that "as a consequence of the false representations provided by GEORGE MICHAEL SHIPSEY, First California Mortgage and McMorgan and Company authorized the release of money from the Pension Fund accounts, as well as the issuance of checks payable to Michael Shipsey and Associates and various subcontractors." Since First Cal and McMorgan were alleged to be agents of the pension funds (Indictment, at Paras. Two and Three), the indictment alleged a simple theory of theft of pension plan funds: Shipsey told lies to the agents of the ERISA-governed pension funds, and in reliance on those false representations, the pension funds released money to Shipsey.

The evidence, however, did not support these allegations of theft and conversion to Shipsey's own use of the assets of the pension funds. Rather, it demonstrated that Shipsey entered into a loan agreement with First Cal, which was not an employee benefit plan, but rather a mortgage company; that Shipsey made representations to First Cal; and that, based on those representations, he was paid monies belonging to First Cal from First Cal

accounts. Indeed, the government conceded that Shipsey never received monies from the pension funds.

> Shipsey argues that there is no evidence that he personally obtained money from the Pension Funds. He only obtained money from First Cal. The government agrees.

Government Brief at 52.

Thus, if theft occurred as a result of any misrepresentations by Shipsey, it was of funds belonging to First Cal. The fact that, as a result of the loan having been sold to the pension funds, First Cal was entitled to seek reimbursement from the pension funds of the monies it paid Shipsey does not establish the thefts from the employee benefit plans charged in the Indictment.

The district court, however, instructed the jury over defense objection on a "transfer" theory of theft liability different from the straightforward and direct thefts alleged in the indictment. At the conclusion of the case, over a defense objection that the proposed instruction would work a constructive amendment of the indictment, the trial court instructed that the jury could convict on the theory that:

> the defendant knowingly and willfully caused a transfer of money that belonged to the employee benefit plan with the intent to deprive the employee benefit plan of the benefit of ownership or possession of that money.

B. The Court's Ruling

On appeal, Shipsey asserted that the government's shift in theory – from the indictment's assertion that Shipsey directly obtained pension funds by making fraudulent misrepresentations to his having obtained First

Cal funds by fraud, thereby causing a wrongful transfer of pension funds to First Cal – constituted a fatal variance from, and a constructive amendment of, the allegations in the indictment. The court rejected that claim on the following basis:

> Shipsey argues the difference between the literal terms of the indictment and the jury instructions was that the jury instructions permitted a conviction if the proof at trial showed Shipsey received the loan proceeds from First Cal, rather than directly from the Pension Funds. This assertion elevates form over substance. The Pension Funds' contractually obligated reimbursements of First Cal rendered the theft – in economic reality – a theft of pension money.

Shipsey, 363 F.3d at 974.

C. The Ninth Circuit's "Economic Reality" Theory of Theft Conflicts With Its Own Decision in *United States v. Rodrigues* and the Third Circuit's Decision in *United States v. Furst*

Section 664 is not a general anti-theft statute, nor does it proscribe all theft of union property, but is specifically designed to protect funds subject to ERISA, the federal statute governing employee benefit plans, and reaches only thefts of such funds. *See United States v. Bell*, 22 F.3d 274 (11th Cir. 1994) (holding § 664 only criminalizes theft of those union monies subject to ERISA). In this case, the government charged a theft of pension funds but did not offer any evidence that proved it; rather, its evidence tended to support the theory that, based on false representations, First Cal, an entity not within the reach of section 664, paid out funds which the pension plans

were contractually required to reimburse. At best, the government proved Shipsey caused a loss of pension funds, not that he obtained pension funds by theft or fraud, in violation of the Fifth Amendment's requirement that a defendant be tried only upon the charge on which he was indicted.

The court of appeals, in essence, held that because "in economic reality" the pension plans lost money, any distinction between causing an economic loss to a party and stealing that party's money is one that "elevates form over substance." The implications of the panel's ruling are enormous. Section 664, which is expressly directed at the theft of pension funds, would be radically and impermissibly expanded without limit to include other forms of pension fund loss. This holding contravenes the longstanding rule of strict construction of penal statues. *Cf. United States v. Braverman*, 373 U.S. 405, 408 (1963) ("criminal statutes should not by interpretation be expanded beyond their plain language"); *Smith v. United States*, 360 U.S. 1, 9 (1959) (criminal statutes must be strictly construed in favor of defendants).

Moreover, the notion that the "economic reality" of loss makes it irrelevant whether that loss was caused by theft or by other means contradicts the Ninth Circuit's own holding in *United States v. Rodrigues*, 159 F.3d 439 (9th Cir. 1998), a factor that should militate in favor of this Court's granting certiorari. *See, e.g., Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (granting certiorari "because of this intracircuit conflict"); *John Hancock Mut. Life Ins. Co. v. Bartels*, 308 U.S. 180, 181 (1939) (granting certiorari because of intracircuit conflict and importance of question presented).

In *Rodrigues*, the defendant was charged in Count Sixteen with theft from a "financial institution" as a result of his taking money from a refund account at Cal Housing. The money taken by Rodrigues from the Cal Housing account was money owed to the New Saratoga Bank; Cal Housing did not meet the legal definition of a "financial institution," a necessary element of the charged offense, but New Saratoga did. The Ninth Circuit rejected the argument that the taking of monies from the Cal Housing account constituted theft from New Saratoga, the only entity that could satisfy the "financial institution" element of the charged crime, because it could not be said that New Saratoga owned the money taken.

> An entitlement or right to receive is an interest distinct from ownership. If A takes money from your debtor so your debtor cannot pay what he owes you, A does not defraud you. Taking money from Cal Housing, thereby impeding payment of its obligations to New Saratoga, was not a fraud on New Saratoga. Count Sixteen was not proven.

Id. at 448.

The court then made a similar finding as to Rodrigues' related conviction on Count Seventeen:

> Embezzlement requires that the property taken be owned by the victim, not owed to the victim. *Wayne R. LaFave and Austin W. Scott, Jr., Criminal Law*, § 8.6(d) (2d ed.1986). A person or an institution who has a claim to money does not own the money. The money does not "belong" to that person or institution. So, here, whatever entitlement New Saratoga might have established to receipt of the refunds, they were not owned by New Saratoga. The government did not produce the slightest evidence to show that New Saratoga

> was the owner of the property it alleged Rodrigues embezzled.

159 F.3d at 448.

This case is analogous to *Rodrigues* in the sense that by advancing money to Shipsey, First Cal created a right to be reimbursed with monies from the four pension funds. The fact that First Cal's disbursements to Shipsey generated a claim on the mortgage company's part to receive assets of the pension funds did not, however, mean that the money disbursed to Shipsey from the First Cal credit line was in fact owned by, or an asset of, the pension funds; to the contrary, the credit line assets out of which Shipsey was paid belonged to First Cal. Furthermore, as *Rodrigues* makes clear, even assuming Shipsey did defraud First Cal of its assets and that fraud resulted in economic damage to the pension funds, that loss in no way establishes that Shipsey defrauded the pension funds of assets they owned. Whether or not Shipsey's receipt of monies from First Cal offended some federal law, it did not constitute a violation of section 664, which applies only to thefts of assets of employee benefit plans subject to ERISA.

Unlike the Ninth Circuit, the Third Circuit reached the correct result in *United States v. Furst*, 886 F.2d 558 (3rd Cir. 1989). Reversing the defendant's convictions on two section 664 counts, the court stated:

> It is indisputable that one substantive element of 18 U.S.C. § 664 is that the account from which funds are embezzled must be one of the two types of accounts defined in the statute; if the account is not governed by ERISA, section 664 is inapposite. Consequently, if the government did not produce evidence from which the jury could conclude that the account from which funds were

> embezzled was an ERISA account, Furst's motion for acquittal on the section 644 charges should have been granted.

Id. at 565.[1]

In that case, the government charged a scheme by which the defendant "engaged in a three-step transaction to sell stock held by another account he controlled . . . to an ERISA account . . . he also controlled." *Id.* at 562. By buying the stock from the first account at a lower price than he sold it to the third (ERISA) account, the defendant generated substantial monies in the second account through which the trades were implemented. *Id.* at 562-63. Even though "the portion of the stock's value that reflected appreciation over market interest was removed from the [first] non-ERISA account without compensation," the court held that, because the indictment did not charge the defendant "with any crime with respect to the non-ERISA accounts . . . , any wrongful acts of [defendant] as to those accounts would not constitute a violation of 18 U.S.C. § 644." *Id.* at 565-66.

Although the court ultimately ruled that the government failed to prove that the ERISA account had been overcharged at all, its holding as to the non-ERISA account was independent of that ruling. *Id.* at 565-67. Thus, the Third Circuit, without even a nod to any "economic reality" theory, gave real meaning to the ERISA-fund element of section 664, as well as to specific allegations of that statute's violation as charged in the indictment. The Ninth Circuit's *Shipsey* decision failed on both of these scores.

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[1] The *Furst* opinion's references to section 644 appear to be typographical errors.

The court of appeals' holding that the "economic reality" that the defendant caused the alleged victim monetary loss relieved the government of its burden of proving that the defendant stole the victim's money. This represents an unwarranted judicial expansion of the scope of section 664, creates a conflict with the circuit's own prior decisionmaking and that of at least one other circuit, and calls for this Court's correction.

CONCLUSION

For the reasons stated, the Court should grant the instant petition and order briefing and argument on the case in this Court.

Dated: October 21, 2004

Respectfully submitted,

DENNIS P. RIORDAN

Counsel of Record
for Petitioner
George Michael Shipsey

363 F.3d 962

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

George Michael SHIPSEY, Defendant-Appellant.

No. 02-10651.

Argued and Submitted March 8, 2004.
Filed April 9, 2004.
As Amended May 12, 2004.

Dennis P. Riordan, Riordan & Horgan, San Francisco, CA, for the defendant-appellant.

Lawrence J. Leigh, Assistant United States Attorney, San Francisco, CA, for the plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California; D. Lowell Jensen, United States District Judge, Presiding. D.C. No. CR-93-00624-DLJ.

Before: HALL and GRABER, Circuit Judges, and WEINER, Senior District Judge. *

WEINER, Senior District Judge:

I.

George Michael Shipsey appeals his conviction on charges of mail fraud (18 U.S.C. § 1341), wire fraud (18

* Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

U.S.C. § 1343), and theft from an employee pension fund (18 U.S.C. § 664), arising from the diversion of construction loan proceeds. Previously, another panel of this court had vacated his first conviction on these charges, *United States v. Shipsey,* 190 F.3d 1081 (9th Cir.1999) ("*Shipsey I*"), and remanded for a new trial. The district court had jurisdiction pursuant to 28-U.S.C. § 1331; this court has jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the convictions.

II.

Shipsey was originally indicted on December 31, 1993. Counts 1 through 9 charged mail fraud; counts 10 through 13 charged wire fraud; counts 14 through 20 charged theft from an employee pension plan; and counts 21 through 24 charged money laundering (18 U.S.C. § 1957). His first trial commenced on May 20, 1997. Counts 21 and 22 were dismissed by the district court at the end of the government's case-in-chief. The jury deadlocked on counts 1 through 13; it found Shipsey guilty on counts 14 through 20 and 23 through 24. The district court declared a mistrial on the deadlocked counts and Shipsey was sentenced to 37 months' imprisonment. He remained free on bond pending appeal.

On remand, following the decision in *Shipsey I,* the district court dismissed counts 1 through 13 of the original indictment without prejudice, due to a Speedy Trial Act violation. A superseding indictment recharged the first eight of the nine dismissed mail fraud counts, all of the wire fraud counts (superseding counts 9 through 12), and the other counts that had not been previously dismissed with prejudice (superseding theft counts 13 through 19;

superseding money laundering counts 20 through 21). On February 14, 2001, the district court granted in part and denied in part Shipsey's motion to dismiss; it dismissed superseding theft counts 17, 18 and 19 and superseding money laundering counts 20 and 21, for failure to state an offense.[1] It denied the motion as to the remaining counts, rejecting Shipsey's argument that the superseding counts were barred by the statute of limitations.

Shipsey's retrial resulted in a conviction on all of the undismissed superseding counts (1 through 16). He was sentenced to 30 months' imprisonment on each count, to run concurrently. He remains free on bond pending appeal.

III.

Shipsey is a land developer and building contractor. He was one of three general partners in Michael Shipsey and Associates ("the partnership").[2] In 1988, the partnership began developing a project called Stonefield at Fountaingrove in Santa Rosa, California ("Stonefield"). Shipsey was hired by the partnership to be general contractor on the project. He received a fee for his services of 5% of the total construction cost. At the same time, Shipsey was building his own palatial residence on Obertz Lane in

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[1] Counts 17-19 were dismissed because, although they alleged a violation of 18 U.S.C. § 664, theft from an employee pension plan, no pension plan was named in the counts, only First California Mortgage Company ("First Cal"). Counts 20-21 were likewise dismissed because although they alleged violations of 18 U.S.C. § 1957, laundering of money obtained in violation of § 664, they also named no pension plan, only First Cal.

[2] The other two partners withdrew from the partnership and the project when it was less than one-half complete.

Novato, California ("Obertz"). Basically, the crimes charged in this case arose from Shipsey's using money loaned to the partnership to build Stonefield to pay unpaid debts to subcontractors for the construction of the Obertz mansion.

Shipsey sought financing for Stonefield from McMorgan & Co. McMorgan acted as investment manager for several union pension funds, including four at issue here, those of the Carpenters, Operating Engineers, Plasterers, and Sheet Metal Workers unions (collectively "the Pension Funds"). Shipsey met with McMorgan's vice-president, Michael Fry. Through Fry, the government established Shipsey's knowledge that the lenders on the project would be union pension trust funds. Fry committed the Pension Funds to a $19 million loan to fund the Stonefield project.

Rather than drawing loan proceeds directly from the Pension Funds, the partnership signed its loan agreement with First Cal, a company associated with McMorgan. First Cal then sold the note to the Pension Funds, pursuant to a previously executed agreement. The construction loan agreement that Shipsey signed specifically provided that First Cal would sell the indebtedness to ERISA governed pension funds. First Cal serviced the loans. It made disbursements to the partnership out of its own funds, via a line of credit it maintained at American Security Bank. First Cal was then reimbursed from the Pension Funds, subject to McMorgan's approval.

To obtain draws on the loan, Shipsey was required to submit draw requests as it received bills from subcontractors and suppliers. Another company employed by First Cal, Project Control, prepared reports on the progress of the project and reviewed the draw requests. First Cal and

McMorgan also had to review and approve the draw requests. Once McMorgan gave the final okay, First Cal issued loan proceeds in the form of two-party checks, made payable to both the partnership and the subcontractor or supplier. First Cal then submitted its requests for reimbursement to McMorgan, which authorized wire payment transfers from the pension funds to First Cal's account at American Security Bank.

Trial evidence demonstrated that portions of the loan advances were diverted from the Stonefield project to pay bills incurred by Shipsey in building the Obertz residence. Several subcontractors on the Stonefield project also worked at Obertz. Shipsey directed his office staff to include Obertz invoices in the Stonefield draw requests. In addition, Shipsey made agreements with subcontractors who were owed money on Obertz to increase the prices invoiced on Stonefield work – and paid from the loan proceeds – thereby folding the Obertz debts into the cost of building Stonefield. Within months of the start of construction at Stonefield, First Cal expressed concerns over cost overruns. By April 1989, it determined that the amount of the remaining loan funds would be insufficient to complete construction. In December 1989, it declared the loan in default. Nonetheless, it continued funding draw requests until at least March 1990. By July 1990, all funding and construction ceased and the pension funds began foreclosure.

IV.

Shipsey first argues the district court erred by rejecting his proposed jury instruction on good faith as a defense

to the fraud charges.[3] His instruction would have charged the jury that: (1) the government had the duty to prove the intent element of the mail fraud, wire fraud and theft from an employee benefit plan charges beyond a reasonable doubt; (2) good faith was a complete defense to these charges because good faith is inconsistent with an intent to defraud; and (3) the government had to disprove good faith in order to establish intent. Rather than give the defendant's proffered instructions, the district court charged the jury on good faith as part of its charge on the element of intent to commit each offense. Regarding mail fraud, it charged in pertinent part that

> an attempt to defraud is an attempt to deceive or cheat. In determining whether or not the defendant acted with an intent to defraud, you may consider whether or not the defendant had a good-faith belief in the truthfulness of representations made by him or a good-faith belief that the disbursements were authorized.

The district court gave an almost identical charge for the wire fraud counts. As regards the theft from pension plan charges, the court charged:

> In determining whether or not defendant acted with an intent to defraud in causing a disbursement of monies by an employee benefit plan, you

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[3] We review de novo whether the district court's instructions adequately presented the defendant's theory of the case. *United States v. Smith*, 217 F.3d 746, 750 (9th Cir.2000). The court's "precise formulation" of the instructions is reviewed, however, for an abuse of discretion. *United States v. Dixon*, 201 F.3d 1223, 1230 (9th Cir.2000). Whether a jury instruction misstates elements of the crime is a question of law reviewed de novo. *United States v. Knapp*, 120 F.3d 928, 930 (9th Cir.1997).

> may consider whether or not the defendant had a good-faith belief in the truthfulness of the representations made by him or a good-faith belief that the disbursements were authorized.

Shipsey takes issue with the trial court's failure to specifically instruct that the government had the burden to disprove good faith, and that a finding Shipsey did act under a good faith belief would preclude a finding of specific intent. This argument is unsupportable for several reasons. First, the district court's charge clearly included the requirement that the government had the burden to prove each element, including the element of intent, beyond a reasonable doubt. Second, the court correctly instructed the jury on the definition of intent, i.e., an intent to deceive or cheat. Third, the court did, in fact, charge that a good faith belief in the truthfulness of representations made could be considered in determining intent.

Our case law is well settled that a criminal defendant has "no right" to *any* good faith instruction when the jury has been adequately instructed with regard to the intent required to be found guilty of the crime charged, notwithstanding the normal rules governing "theory of defense" requests. *See, e.g., United States v. Frega,* 179 F.3d 793, 804 (9th Cir.1999) (where district court provided adequate instruction on specific intent element of mail fraud, instruction that "good faith was a complete defense" was not required); *United States v. Dees,* 34 F.3d 838, 842 (9th Cir.1994) (specific good faith instruction is unnecessary where the court has already adequately instructed the jury as to specific intent). We have held:

> Notwithstanding the normal rules governing "theory of defense" requests, the Ninth Circuit

> has held that "the failure to give an instruction on a 'good faith' defense is not fatal so long as the court clearly instructed the jury as to the necessity of 'specific intent' as an element of a crime."

United States v. Sarno, 73 F.3d 1470, 1487 (9th Cir.1995) (quoting *United States v. Solomon*, 825 F.2d 1292, 1297 (9th Cir.1987)); *see also United States v. Dorotich*, 900 F.2d 192, 193-94 (9th Cir.1990).

There can be little doubt that the court correctly defined intent. Its charge – that intent to defraud is an intent to deceive or cheat – comes directly from Ninth Circuit Model Criminal Jury Instructions § 3.17. Indeed, Shipsey does not appear to argue that the intent definition was erroneous. As the district court defined intent to defraud, no good faith instruction was necessary at all, and certainly not the defendant's specific instruction. Where the instruction actually given was legally sufficient, a defendant cannot successfully contend that declining to use his specific formulation was an abuse of discretion.

V.

Shipsey next argues the district court erred when it reinstated charges that had been previously dismissed under the Speedy Trial Act, because he was not reindicted on the charges until long after the five-year statute of limitations had run.[4] The statute of limitations applicable

[4] The district court's conclusion that a particular statute of limitations applies is reviewed de novo. *United States v. Workinger*, 90 F.3d 1409, 1412 (9th Cir.1996); *United States v. Manning*, 56 F.3d 1188, 1195 (9th Cir.1995). The construction or interpretation of a statute is reviewed de novo. *United States v. Pluff*, 253 F.3d 490, 492 (9th Cir.2001).

to the crimes charged in this indictment is the five-year statute for non-capital offenses, 18 U.S.C. § 3282.[5] The statute of limitations must be read in conjunction with 18 U.S.C. § 3288, which provides a six-month grace period in situations where an indictment is dismissed after the statute of limitations expires. The current version of the statute provides in pertinent part:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information . . . . This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.
> 18 U.S.C. § 3288.

Shipsey, indisputably, was originally indicted within the five-year statute of limitations. The original indictment containing those counts was, however, dismissed on speedy trial grounds, without prejudice, by the district court on October 24, 2000, after the return of the mandate from the first appeal. The superseding indictment was returned on November 6, 2000 – beyond the expiration of

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[5] The section provides: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. § 3282(a).

the statute of limitations, but within the six-month grace period provided by the current version of § 3288. The issue presented then, is whether the current version of the savings clause is applicable to a without-prejudice dismissal due to a speedy trial violation.

Citing our holding in *United States v. Peloquin,* 810 F.2d 911 (9th Cir.1987) (indictment dismissed for Speedy Trial Act violation is not "defective or insufficient"; savings clause of 18 U.S.C. § 3288 (superseded) therefore does not apply), Shipsey argues that the district court erred when it permitted the government to file a superseding indictment, recharging the mail and wire fraud counts that had been the subject of a mistrial due to a hung jury. Because we conclude that the amendment to § 3288 statutorily overruled our holding in *Peloquin,* we reject Shipsey's argument. We begin our analysis with the district court's speedy trial rulings.

The Speedy Trial Act's sanction provision at issue here is 18 U.S.C. § 3162(a)(2), which provides in pertinent part:

> If a defendant is not brought to trial within the time limit required by section 3161(c) [70 days] as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant . . . . In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

The district court's October 24, 2000, order cited the statute and considered the pertinent factors. It found that

more than 70 non-excludable days elapsed from the date the court declared a mistrial on the deadlocked mail fraud and wire fraud counts. Accordingly it conducted a prejudice analysis, finding (1) the seriousness factor did not clearly weigh in either party's favor; (2) the facts and circumstances weighed in the government's favor (the delay was caused by the first appeal, Shipsey was not in custody, evidence was preserved in the first trial's transcripts, any onus Shipsey suffered from the pending counts was no greater than that which he suffered from the counts of conviction that were appealed); and (3) the effect on administration of justice and the Speedy Trial Act also weighed in the government's favor because this was not a case where the time limits were routinely disregarded, rather the delay was caused primarily by the appeal. The district court accordingly concluded that the dismissal should be without prejudice.

A. Section 3288's Amendment and our prior precedents.

The current version of § 3288 was enacted by Congress as part of the Anti-Drug Abuse Act of 1988, Pub.L. No. 100-690, § 7081(a), 102 Stat. (1988 U.S.C.C.A.N.) 4181, 4407. Prior to the amendment the statute provided a different standard for when the savings clause applied. The prior version provided in pertinent part:

> Whenever an indictment . . . is found . . . defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned . . . within six calendar months of the date of the dismissal . . . .

18 U.S.C. § 3288 (superseded). The amended version eliminated the "defective or insufficient" phrasing,

substituting instead that when an indictment is "dismissed for any reason," it may be reinstated so long as the original was not dismissed because of a failure to file it within the statute of limitations, or "some other reason that would bar a new prosecution."

Our decision in *Peloquin* construed the now superseded statute. As here, the district court had dismissed an indictment without prejudice, due to a Speedy Trial Act violation. Also as here, the government reindicted the defendant after the statute of limitations had expired, but within the six-month grace period. We determined that an indictment dismissed for a Speedy Trial Act violation is not "insufficient[or] defective, either by its own terms or with reference to the grand jury proceedings. It was simply out of time, and that does not suffice for the government to invoke the six months savings period of section 3288." *Id.*, 810 F.2d at 913.

Peloquin relied in great part on the seminal decision in *United States v. Strewl,* 99 F.2d 474 (2d Cir.1938), and our own decision in *United States v. Charnay,* 537 F.2d 341 (9th Cir.1976). In *Strewl,* Judge Learned Hand had first set out the prevailing law on the statute. In *Charnay,* we approved the application of the savings clause where the original indictment did not state facts sufficient to constitute a crime. *Charnay* distinguished two district court decisions which had concluded dismissal of an indictment for failure to prosecute did not trigger § 3288, *United States v. Moriarty,* 327 F.Supp. 1045 (E.D.Wis.1971), and *United States v. DiStefano,* 347 F.Supp. 442 (S.D.N.Y. 1972), noting that a Speedy Trial Act violation was not a defect with the indictment itself. *Charnay,* 537 F.2d at 355. In *Peloquin,* we concluded that where an indictment is not

itself defective, extending the statute of limitations would not further Congress's goal in enacting § 3288,

> which is to discourage defendants from delaying their motions to dismiss until after the statute of limitations has run. Unlike the defendant in *Charnay,* this defendant could not have made his motion until after the five years had run. Refusing to apply section 3288 to Speedy Trial Act dismissals does not further manipulation by a defendant.
> *Peloquin,* 810 F.2d at 912-13.

Congress amended § 3288 within one year of our decision in *Peloquin.* It specifically deleted the more narrow "defective or insufficient" wording on which we had relied in our decision, broadening the text to arguably include dismissals for Speedy Trial Act violations.[6] *Peloquin* turned on the fact that a Speedy Trial Act violation was not a "defect" in the indictment itself, and was thus insufficient to trigger the savings clause. Because under the amended statute, a "defect" is no longer required, Shipsey's reliance on *Peloquin* is unavailing.

We have construed the amended version of § 3288 in only one published opinion, *United States v. Clawson,* 104 F.3d 250 (9th Cir.1996). In *Clawson,* the district court dismissed the original indictment, charging a conspiracy and mail fraud, because it failed to allege an overt act within the statute of limitations period. The government

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[6] The amendment to § 3288 was derived from the section 182 of Senate Bill 2485, the Minor and Technical Criminal Law Amendments Act of 1988. The legislative history of the amendment makes clear that Congress specifically intended to legislatively overturn the decision in *Peloquin. See* 134 Cong. Rec. 13785-86 (1988).

promptly obtained a superseding indictment to correct the error. By then, however, the statute of limitations had run as to all of the defendant's involvement in the conspiracy. We held that the government was entitled to the six-month grace period:

> Clawson urges us to read the last sentence of section 3288 as barring the use of the section's savings provision whenever an indictment is dismissed because of failure to comply with the statute of limitations. But the sentence says more: It denies the government the six-month extension if an indictment is dismissed for failure to meet the statute of limitations "or some *other* reason that would bar a new prosecution." Read in its entirety, this last sentence cuts off the six-month grace period only where the defect – whether it's a limitations problem "or some other" problem – is not capable of being cured.

Id. at 252 (emphasis in original). We concluded that where an original indictment is brought within the limitations period, but is dismissed for failure to allege the exact elements of the crime or some other technicality, the savings clause "merely allows the government to do what it had a right to do in the first place." *Id.*[7]

As in *Clawson*, the Speedy Trial Act violation at issue here was capable of being cured to permit the government to do what it had a right to do in the first place, i.e., retry the hung jury counts after Shipsey's first appeal was concluded. Bearing most heavily on the § 3288 analysis

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[7] In *Clawson*, we distinguished the situation of an indictment that was originally untimely; allowing reindictment under § 3288 in that case would "obliterate" the statute of limitations. 104 F.3d at 252.

must be the fact that the district court's speedy trial analysis led to its dismissing the counts without prejudice, the propriety of which Shipsey does not contest on appeal. Had the government still been within the original statute of limitations period when the without-prejudice dismissal was entered, it would not have been barred from refiling the charges. Accordingly, we conclude that, where as here, the original indictment was timely returned, § 3288 allows reindictment within the grace period, where a Speedy Trial Act dismissal after the statute of limitations' expiration is without prejudice.

VI.

Next, Shipsey argues that the wirings of funds established by the government were too tangential to the alleged scheme to defraud to support the convictions.[8] He focuses upon the fact that his allegedly fraudulent draws were sent to First Cal, while the wirings were between the Pension Funds and American Security Bank. He argues that the only rational inference permitted by the evidence is that it was "irrelevant" to Shipsey whether the Pension Funds ever wired money to American Security Bank. To put it simply, Shipsey's argument ignores the totality of the government's evidence, which established that the wirings were caused to occur based upon his fraudulent misrepresentations. Coupled with the government's

[8] Claims of insufficient evidence are reviewed de novo. *United States v. Antonakeas,* 255 F.3d 714, 723 (9th Cir.2001). There is sufficient evidence to support a conviction if, "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

evidence that Shipsey knew how the loan transaction was structured, we find it established that the wirings were in furtherance of the scheme to defraud.

Wire fraud has three elements: (1) a scheme to defraud; (2) use of the wires in furtherance of the scheme; and (3) a specific intent to deceive or defraud. *See* 18 U.S.C. § 1343;[9] *United States v. Garlick,* 240 F.3d 789, 792 (9th Cir.2001); *United States v. Bonallo,* 858 F.2d 1427, 1433 (9th Cir.1988). Each use of the wires constitutes a separate violation of the wire fraud statute. *Garlick,* 240 F.3d at 792. "In general, to be in furtherance of a scheme, the charged mailing or wire transmission need not be an essential element of the scheme, just a 'step in the plot.'" *Id.* at 795 (quoting *Schmuck v. United States,* 489 U.S. 705, 711, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989)).

Schmuck involved an automobile *wholesaler* who rolled back odometers on used cars. The mailings[10] established by the government occurred when the automobile *retailer* further down the delivery chain mailed the title applications to the Wisconsin Department of Transportation on behalf of the purchaser of the altered odometer vehicles. Like Shipsey, Schmuck argued that the mailings

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[9] "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both."

[10] It is well settled that cases construing the mail fraud and wire fraud statutes are applicable to either. *Carpenter v. United States,* 484 U.S. 19, 25 n. 6, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987).

occurred after the fraud had already come to fruition and were thus merely tangentially related to the fraud. *Id.* The Court concluded that, given the evidence of the large scale nature of the ongoing scheme, rather than a one-shot operation, a rational jury could have concluded that the success of the venture depended upon the smooth flow of cars from the retailers to the customers and, thus, the registration mailings were "'incident to an essential part of the scheme.'" *Id.* at 711-12, 109 S.Ct. 1443 (quoting *Pereira v. United States,* 347 U.S. 1, 8, 74 S.Ct. 358, 98 L.Ed. 435 (1954)).

In reaching its conclusion, the *Schmuck* court distinguished the same three cases relied upon here by Shipsey, *Kann v. United States,* 323 U.S. 88, 65 S.Ct. 148, 89 L.Ed. 88 (1944), *Parr v. United States,* 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), and *United States v. Maze,* 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974). *Kann* involved corporate officers who set up a dummy company to divert profits. They caused the corporation to issue checks they cashed at a local bank. The local bank then mailed the checks to the drawee bank for payment. The Court found the mailing to be insufficient, holding "[i]t was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank." *Kann,* 323 U.S. at 94, 65 S.Ct. 148. *Parr* involved an unauthorized use of a school district's credit card to obtain gasoline. The mailings occurred when the oil company sent the bill to the school district and the school district mailed back payment. Relying on *Kann,* the *Parr* court found the mailings were insufficient because it was immaterial to the defendants how the oil company collected the payment. *Parr,* 363 U.S. at 393, 80 S.Ct. 1171. *Maze* also involved a stolen

credit card, used to pay for lodging at a motel. The mailing was the innkeeper's transmittal of the invoice to the credit card company. Like in *Parr,* the Court found the mailings insufficient because the defendant's scheme reached fruition when he checked out of the motel; which victim ultimately bore the loss was immaterial to the scheme. *Maze,* 414 U.S. at 402, 94 S.Ct. 645.

As in *Kann, Parr,* and *Maze,* the relationship here between the wirings and Shipsey's scheme – on the surface at least – concerned the "repayment" by a third party of the diverted monies. The difference, however, is clearly distinguishing. Shipsey's scheme did not "reach fruition" when he sent the fraudulent draw requests to First Cal. The government's evidence established that Shipsey knew the Pension Funds were the ultimate source of the loan capital and would ultimately bear the loss. He also had knowledge of the approval process. First Cal could not have funded the draw requests without the wired reimbursements from the Pension Funds. Thus, the "repayment" was not wired or mailed by an otherwise disinterested third party. The question of who would ultimately bear the loss of the fraud was not immaterial to Shipsey; the wirings were clearly "incident to an essential part of the scheme."

VII.

This same evidence also refutes Shipsey's argument that there was insufficient evidence to support the verdict on theft from a pension fund. Counts 13-16 charged violations of 18 U.S.C. §§ 664 and 2. Section 664 provides in pertinent part:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined under this title, or imprisoned not more than five years, or both.

18 U.S.C. § 664. Employee welfare benefit and pension plans are further defined as any plan governed by Title I of ERISA. *Id.* Title 18 U.S.C. § 2(b) is the general federal criminal statute governing the liability of principals.[11] These counts also incorporated by reference Paragraph 6 of the superseding indictment, which outlined Shipsey's scheme to defraud. It provided in part that "as a consequence of the false representations . . . First California Mortgage Company and McMorgan and Company authorized the release of money from the Pension Fund accounts."

Shipsey's sufficiency-of-the-evidence argument goes as follows: his loan agreement was only with First Cal, he sent the draw requests only to First Cal, and only First Cal funded the draw requests. Thus, there was a failure of proof that he stole from an ERISA-governed entity; where First Cal got its capital, and whether it had a legal entitlement to reimbursement from the Pension Funds, did not establish a theft by him of pension fund money. The government agrees that Shipsey did not receive money

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[11] "Whosoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

directly from a pension fund. Nonetheless, it argues there was sufficient evidence of criminal liability because the indictment charged a violation of § 664 in conjunction with § 2(b) and the government proved that Shipsey, as a principal, caused the transfer of pension fund assets by others, thereby illegally benefitting Shipsey and impairing the Pension Funds' collateral in Stonefield. We agree.

It is irrelevant that Shipsey did not steal *directly* from a pension fund, given the government's theory that he is liable under § 2(b) as a principal. The evidence established that Shipsey willfully caused the reimbursement wire transfers from the Pension Funds to First Cal's account when he submitted the false draw requests containing the misrepresentations that caused them to be approved. A rational trier of fact could have found that Shipsey "caused" the unauthorized takings of fund assets from the evidence that he knew how the loan was structured, his misrepresenting his entitlement to draws on the underlying construction loan, and the government's ample proof of the diversions through over billings, double billings and kickbacks.

We must address, however, whether the use of this causation theory was an improper amendment of the crime the grand jury charged in the indictment.[12] We most

[12] This issue of constructive amendment was also raised in Shipsey's first appeal, and was the reason his original convictions were vacated. In Shipsey's first appeal, we found a constructive amendment had occurred. The original indictment charged Shipsey stole pension fund assets by use of false pretenses. The district court, however, never instructed the jury on theft by false pretenses. Rather, the district court's instructions in the first trial permitted the jury to convict on a theory that he obtained the pension fund money by a "wrongful act" or if he converted the money. *Shipsey I*, 190 F.3d at 1086. We found this

(Continued on following page)

recently reviewed the law regarding constructive amendment in *United States v. Adamson,* 291 F.3d 606 (9th Cir.2002):

> An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect by the prosecutor or a court after the grand jury has last passed upon them. A variance, on the other hand, occurs when . . . the evidence offered at trial proves facts materially different from those alleged in the indictment.
>
> The line between a constructive amendment and a variance is at times difficult to draw . . . .
>
> In our efforts to draw this line, we have found constructive amendment of an indictment where (1) there is a complex of facts [presented at trial] distinctly different from those set forth in the charging instrument, or (2) the crime charged [in the indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved.
>
> Although a constructive amendment usually involves a complex of facts, we have generally found a variance where the indictment and the proof involve only a single, though materially different, set of facts.

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was a constructive amendment to the indictment, and not merely a non-prejudicial variance, because it permitted the petit jury to convict on a theory of theft not charged by the grand jury. Nowhere in the original indictment, we held, was there a statement of facts and circumstances that would support other possible § 664 theft theories. As the original indictment gave Shipsey notice only of the false pretenses theory, we found the government was obliged to prove this theory. *Id.* at 1087.

Id. at 614-15 (citations and internal quotation marks omitted).

On retrial, the district court, over Shipsey's objection, included in its charge on the law of false pretenses the government's "willful causation of a transfer" theory. It charged that the jury must find "the defendant knowingly and willfully caused a transfer of money that belonged to the employee plan with the intent to deprive the employee benefit plan of the benefit of ownership or possession of that money." There was no constructive amendment of the indictment arising from this instruction. There was only "one complex of facts" alleged in the indictment and proved at trial – the false-pretenses scheme to divert loan proceeds from Stonefield to pay for Obertz through the use of fraudulent draw requests. Shipsey argues the difference between the literal terms of the indictment and the jury instructions was that the jury instructions permitted a conviction if the proof at trial showed Shipsey received the loan proceeds from First Cal, rather than directly from the Pension Funds. This assertion elevates form over substance. The Pension Funds' contractually obligated reimbursements of First Cal rendered the theft – in economic reality – a theft of pension money. In addition, the crime proved by the trial evidence was not "substantially altered" from the one charged in the indictment, since the grand jury recited that "Shipsey entered into a $19,400,000 loan agreement with First California Mortgage Company which assigned all of its rights, title and interests in the construction loan agreement to First Interstate Bank of California, corporate co-trustee for [the Pension Funds]," and alleged liability under 18 U.S.C. § 2(b) in conjunction with § 664. Thus, we can know with certainty that the grand jury knew of the government's

transfer theory, and indicted Shipsey for the indirect theft of the pension assets via the fraudulently induced loan draws from First Cal.

AFFIRMED.

U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. CR93-0624-DLJ
V.	)	**ORDER**
GEORGE MICHAEL SHIPSEY,	)	(Filed Oct. 08, 2002)
Defendant.	)	

On October 4, 2002, the Court heard argument on defendant's motion for new trial. Lawrence Leigh appeared on behalf of the United States; Harold Rosenthal appeared for defendant. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby DENIES defendant's motion for new trial.

I. BACKGROUND

A. Factual Background and Procedural History

Defendant was originally charged in 1993 in a 24-count indictment. Counts 1-9 alleged that defendant violated *18 U.S.C. § 1341* (mail fraud). Counts 10-13 alleged violations of *18 U.S.C. § 1343* (wire fraud). Counts 14-20 alleged violations of *18 U.S.C. § 664* (theft by false pretenses from an employee pension plan). Lastly, Counts 21-24 alleged violations of *18 U.S.C. § 1957* (money laundering).

Defendant's jury trial began on May 20, 1997. At the conclusion of the government's case, on defendant's motion, the Court dismissed two of the money laundering

charges. On June 12, 1997, the jury returned a verdict against defendant on all theft counts (Counts 14-20) and the two remaining money laundering counts (Counts 23 and 24). The jury informed the Court that it could not reach a verdict as to the wire and mail fraud counts (Counts 1-13), and the Court declared a mistrial as to those counts. On April 22, 1998, the Court sentenced defendant to 37 months of imprisonment on each count, to run concurrently.

On September 9, 1999, the Ninth Circuit reversed and remanded defendant's conviction based on an improper jury instruction.

On October 20, 2000, on defendant's motion, the Court dismissed without prejudice Counts 1-13 (mail and wire fraud) on the basis of a Speedy Trial Act violation.

The government sought re-indictment, and the grand jury returned a Superseding Indictment on November 2, 2000. The Superseding Indictment re-alleged in Counts 1-12 all but one of the thirteen original mail and wire fraud charges. The government added additional language alleging materiality of the falsehoods that were part of the scheme and artifice alleged. Counts 13-19 of the Superseding Indictment re-alleged theft by false pretenses from employee pension plans without the specific dollar amounts alleged in the original indictment. Counts 20 and 21 re-alleged money laundering.[1]

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[1] The government decided not to seek re-indictment of Count 1 of the original indictment. Counts 22 and 23 of the original indictment were dismissed by the Court at trial.

The defendant moved to dismiss the indictment based upon three reasons. One, defendant argued that Counts 1-21 were barred by the statute of limitations. Two, defendant argued that Counts 13-19 should be dismissed because they violate the proscription against duplicity. Three, defendant argued that Counts 17-21 should be dismissed because they fail to state an offense. The Court denied defendant's motion to dismiss Counts 1-16 and granted defendant's motion to dismiss Counts 17-21.[2]

The retrial of this case commenced on May 6, 2002. On May 23, 2002, the jury returned a guilty verdict on the remaining Counts 1-16 of the superseding indictment.

Defendant now moves for a new trial based on three grounds. One, the defendant argues a new trial should be granted as to Counts 1-12 because they were indicted after the statute of limitations had run. Two, the defendant argues a new trial should be granted as to Counts 13-16 because the jury was instructed on a theory of liability different from that upon which he was indicted. Three, the defendant argues a new trial should be granted as to Counts 13-16 because there was insufficient evidence to support a conviction on these Counts.

B. Legal Standard

1. Motion for a New Trial

Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, this Court may grant a new trial if the interests

[2] The Court found the Counts were not barred by the statute of limitations. Thus, it did not dismiss Counts 1-16. Counts 17-21 were dismissed on other grounds.

of justice so require. "This authority should be exercised sparingly and with caution; nevertheless, the trial court has wide discretion in deciding whether to grant a new trial in the interests of justice." *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980).

A motion for new trial should be granted only in those exceptional cases in which the evidence preponderates highly against the verdict. *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981); *United States v. Rush*, 749 F.2d 1369, 1371 (9th Cir. 1984). The evidence is sufficient to support a conviction if, reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Rush*, 749 F.2d at 1372 (citing *United States v. Marabelles*, 724 F.2d 1374, 1377 (9th Cir. 1984).

2. Statute of Limitations

Title 18, United States Code, *Section 3288* states:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment.

18 U.S.C. § 3288. The statute goes on to state that the six-month grace period does not apply in some situations. Specifically, the last sentence of *18 U.S.C. § 3288* states:

> This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed

> by the applicable statute of limitations, or some other reason that would bar a new prosecution.

18 U.S.C. § 3288. The Ninth Circuit has held that the "last sentence [of *Section 3288*] cuts off the six-month period only where the defect – whether it's a limitations problem 'or some other' problem – is not capable of being cured." *United States v. Clawson*, 104 F.2d 250, 252 (9th Cir. 1996).

II. ARGUMENTS

A. Statute of Limitations

Defendant argues that a new trial should be granted as to Counts 1-12 because they were indicted after the statute of limitations had run. Defendant states that the most recent date set forth in the Superseding Indictment associated with unlawful activity is August 10, 1990, a date more than ten years before the Indictment date of November 2, 2000.

Defendant concedes that the government has a six-month "grace period" in which to re-indict when an indictment originally brought in a timely manner is dismissed after the statute of limitations has run. *See 18 U.S.C. § 3288*; *United States v. Clawson*, 104 F.3d 250, 251 (9th Cir. 1995). Defendant argues, however, that under *United States v. Peloguin*, 810 F.2d 911, 912 (9th Cir. 1987) it is clear that the six-month grace period does not apply where the dismissal occurs, as it does here, because of a violation of a Speedy Trial Act. Defendant acknowledges that Congress amended *18 U.S.C. § 3288* in 1988 to provide the six-month grace period "[w]henever an indictment or information . . . is dismissed for any reason after the period prescribed by the applicable statute of limitations had expired." *18 U.S.C. § 3288*. Nevertheless, the

defendant insists that this amendment does not change the rule of *Peloguin*. Defendant argues that substantively, the statute remains the same. Defendant also argues that if Congress sought to abrogate that rule and extend the scope of the six-month grace period, it would have done so expressly. He argues research of the legislative history of the 1988 revision to *Section 3288* finds no indication that Congress ever suggested the substantive revision argued for by the government. He argues that problems capable of being cured referred to by Congress are pleading problems, and not a Speedy Trial Act violation. Moreover, defendant argues that allowing the government to avail itself of the six-month period following a Speedy Trial Act dismissal is inconsistent with the policies underlying that act.

The exact motion and arguments were presented to the Court in defendant's pretrial motion to dismiss and denied by the Court on February 14, 2001. After reconsidering the matter, the Court denies defendant's motion for the same reasons stated in the Court's February 14, 2001 Order.

B. Constructive Amendment

Pursuant to the Fifth Amendment's Grand Jury Clause, defendants who are charged with felonies have a right to be tried only on the charges set forth in an indictment by a grand jury. *U.S. v. Shipsey*, 190 F.3d 1081, 1085 (9th Cir. 1999); *Stirone v. United States*, 361 U.S. 212, 215, 217 (1960). Accordingly, courts may not substantially amend the indictment through instructions to the jury. *Shipsey*, 190 F.3d at 1086.

"An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them." *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984). An amendment always requires reversal, because it deprives a defendant of his right to be tried on the grand jury's charge. *United States v. Olson*, 925 F.2d 1170, 1175 (9th Cir. 1991); *Stirone*, 361 U.S. at 217, 80 S.Ct. at 273.

Courts have fond constructive amendments, thus requiring reversal, where the crime charged was substantially altered at trial, so that it was impossible to tell whether the grand jury would have indicted for the crime actually proved. *Von Stoll*, 726 F.2d at 586; *United States v. Howick*, 263 F.3d 1056.

For example, in the seminal case of *Stirone*, the court found the jury instructions constructively amended the indictment. In *Stirone*, the indictment alleged that the defendant had obstructed interstate shipments of *sand* to a steel mill construction site. *Stirone*, 361 U.S. at 214. The district court, however, allowed evidence that showed interference with the *export* of *steel*, and instructed the jury that it could convict if it found the defendant interfered with sand or steel. *Id.* at 219. The Court found this change so substantial that it was impossible to know whether the grand jury would have been willing to charge the defendant with the crime actually proved, and thus the conviction was reversed.

Similarly, in *Shipsey*, the Ninth Circuit reversed the defendant's conviction based upon a constructive amendment. *Shipsey*, 190 F.3d at 1085. The indictment alleged

that Shipsey executed theft by false pretenses. The jury instructions, however, permitted the jury to find Shipsey guilty of theft if he engaged in "some wrongful . . . act or taking," which did not require the jury to find that he acted dishonestly or that the victims relied on his dishonest statements. *Id.*

On the other hand, in *Howick*, the court did not reverse a defendant's conviction based on changes in the jury instructions from the indictment. *United States v. Howick*, 263 F.3d 1056 (9th Cir. 2001. Unlike the indictment, language in the jury instructions concerned attempt. The Court recognized the additional language was present, but found it did not constitute an impermissible amendment because it did not unconstitutionally broaden the charges against the defendant. *Id.* at 1063.

In some cases, a divergence of trial proof constitutes a "variance," rather than an "amendment." *Stirone*, 361 U.S. at 215-17. A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment. *Von Stoll*, 726 F.2d at 586-87. While an amendment always requires reversal, a variance requires reversal only if it prejudices a defendant's substantial rights. An "insignificant variance" constitutes harmless error. *Stirone*, 361 U.S. at 215-17.

In *Von Stoll*, for example, the court found an insignificant variance when an indictment specified that the defendant took money from one partner, while the proof showed he got it from another. *Id.* at 597.

Similarly in *Olson*, the court found an insignificant variance when the indictment alleged the defendants intended to obtain money in their scheme to defraud, but

the jury instructions allowed the jury to convict if the jury found intent to steal money or property. *Olson*, 925 F.2d at 1174-76. The court reasoned that the indictment provided fair notice of what the government would prove at trial and, at trial, the government directed its proof to the transactions described in the indictment, which was the intent to obtain money. *Id.* at 1176.

In this case, Shipsey argues that a new trial should be granted as to Counts 13-16 because the jury was instructed on a theory of liability different from that upon which he was indicted, thus constituting an impermissible constructive amendment. Defendant also argues that if the change is viewed as a variance, it prejudiced his substantial rights.

In the superseding indictment, Counts 13-16 charged Shipsey with theft of funds from an employee benefit plan in violation of *Section 664* of Title 18 of the United States Code. Each Count alleges that the defendant "did embezzle, steal and unlawfully and willfully abstract and convert to his own use and the use of another, the monies, funds, credits, property and other assets: of funds from four different pension funds. Shipsey argues that these Counts are allegations of "straightforward" theft, i.e. a theft directly from the victims funds. He argues that these Counts do not indict him based on a "transfer" theory.

On the other hand, Shipsey argues, the jury instructions allowed the jury to convict him based on a "transfer" theory, rather than the "straightforward" theft he was indicted for. He argues the jury instructions stated that "to be convicted of the crime, the government need only prove that he, with the intent to defraud and deprive, caused a victim fund to transfer money that belonged to it by

making false representations upon which the fund relied."[3] He argues that this change in theory constitutes an impermissible "constructive amendment," thus requiring reversal. As Shipsey argues, all of the funds that he obtained were from First California Mortgage Company, rather than coming directly from any of the funds alleged in the indictment. As such, he was convicted based on a "transfer theory."

The Government argues that by referring to the "use of another" in the indictment, Counts 13-16 suggest a transfer to a third party other than Mr. Shipsey. The government also argues that the reference in Counts 13-16 to *18 U.S.C. § 2* indicts defendant based on a transfer theory. Section 2 states in pertinent part "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principle." Finally, the government argues that by incorporating through reference language of Count 1, namely paragraph 6(f), defendant was indicted based on a transfer theory. Paragraph 6(f) states: "as a consequence of the false representations provided by GEORGE MICHAEL SHIPSEY, First California Mortgage

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[3] In the jury instructions, the jury was instructed that the government must prove beyond a reasonable doubt that "the defendant knowingly and willfully stole property from an employment benefit plan for his own use or the use of another . . . and the property belonged to an employee benefit plan subject to the provisions of ERISA. The instructions go on to state that "an act is done willfully if it is done with an intent to defraud . . . In determining whether or not defendant acted with an intent to defraud *in causing a disbursement of monies by an employee benefit plan*, you may consider whether or not the defendant had a good faith belief in the truthfulness of the representations made by him or a good faith belief that the disbursements were authorized." *Jury Instructions*, p. 15-17 (emphasis added).

Company and McMorgan and Company authorized release of money from the Pension Fund Accounts as well as the issuance of checks payable to Michael Shipsey and Associates and various subcontractors."

The Court rejects Shipsey's arguments and finds that the jury instructions did not constitute an impermissible amendment of the indictment. Shipsey's jury instructions did allow for a conviction based on a transfer theory. However, the instructions are consistent with the indictment.

The government's argument that language in the Counts referring to "the use of another" is not very persuasive. This language does not appear to change the theory of direct theft to a transfer theory. Instead, it indicts him based on money stolen and converted not just for his own use, but also for another to use.

However, it is the incorporation by reference of *18 U.S.C. § 2* and Count 1 paragraph 6(f) that indicts Shipsey based on a transfer theory, and not just a "straightforward" theory of theft. Both of these references state a theory whereby money is transferred from the pension funds to First California Mortgage Company by third parties in reliance on Shipsey's representations.

Shipsey relies on *Stirone* as to why his conviction should be set aside. However, Shipsey's case is quite distinguishable. In *Stirone*, the court did not know whether a grand jury would have been willing to charge the defendant based on interference with interstate exportation of steel, as it only charged based on interstate commerce of sand. In this case, it is clear a grand jury would, and did, indict him based on the transfer of money out of the pension funds in reliance upon Shipsey's representations. It is beyond

question that the Grand Jury was presented evidence of a theft accomplished by transfer, and the language of the Indictment returns charges based on a transfer thesis.

Defendant also argues that there was a significant variance between the evidence offered at trial and the indictment prejudicing his substantial rights. The Government argues there was no variance, and "even assuming for the purpose of argument, there was a variance between the indictment and the instructions, such a variance would be insignificant." They argue that what matters for the crime is that the pension funds transferred their money based upon the defendant's false representations. As such, the case is analogous to previous cases where courts found insignificant variances.

The Court finds that there was no constructive amendment or variance in this case. As discussed, the indictment charged Shipsey on both a "straightforward" and "transfer" theory of theft by false pretenses from an employee pension fund. The evidence offered and facts proven at trial were consistent with the indictment.

C. Sufficiency of the Evidence to Support a Conviction Based on Counts 13-16

When assessing the sufficiency of evidence for a conviction, the Court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Olson*, 925 F.2d at 1176, *quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Shipsey argues that Counts 13-16 should be dismissed because there was insufficient evidence to support a conviction on these Counts. Shipsey argues that the government failed to demonstrate at trial that the funds taken by him in his draw requests to First California Mortgage Company were in fact owned by the pension funds. He claims the undisputed evidence is that the funds taken were First California Mortgage Company, and not pension fund monies. Furthermore, defendant argues that *Section 664* only punishes "direct" theft from an employee pension fund, rather than the "indirect" theory proved by the government.

The government agrees that conviction under these Counts requires proof that the defendant caused the transfer of money belonging to the pension funds. The government argues that it did prove the defendant caused the transfer of money from the pension funds to First California Mortgage Company as a consequence of his false representations. Moreover, the government argues that *Section 664* does criminalize "indirect" theft by false pretenses from an employee pension plan, not only a "direct" theory of theft.

Defendant made a motion pursuant to Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal during trial. This motion was orally denied by the Court on May 20, 2002.[4] As in its previous Order, the Court denies defendant's motion. The Court finds that a

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[4] The Court first denied Shipsey's Rule 29 motion on all Counts but the *18 U.S.C. 664* theft counts. After the Court allowed for discussion with respect to the 664 counts, the Court denied Shipsey's motion for this count too. Thus, the Court denied the Rule 29 motion for all Counts.

rational trier of fact could have found the essential elements of the crime to be proven beyond a reasonable doubt.

Contrary to defendant's argument, *Section 664* punishes theft based not only on a direct theory of theft, but also, a "transfer" theory. The Ninth Circuit remanded Shipsey's cases back to the Court for trial after having reversed his conviction in 1999. When the Ninth Circuit remanded the case to this Court, the Court was well aware of the fact that Shipsey was charged under *Section 664* and that the government planned to prove its case pursuant to a "transfer" theory. In fact, the Court denied Shipsey's motion that the evidence presented at his previous trial was insufficient to support a conviction under *Section 664*. Thus, in remanding Shipsey's case to this Court, the Ninth Circuit recognized that *Section 664* contemplates theft by a "transfer" theory.

In addition, the wording of *Section 664* clearly indicates that Congress sought to criminalize theft by false pretenses from an employer pension plan based on both a "direct" and "indirect" theory. *Section 664* states:

> "Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or *of any fund connected therewith*, shall be fined under this title, or imprisoned not more than five years, or both. . . . "

18 U.S.C. § 664 (emphasis added). By including the language "or any fund connected therewith," Congress intended to punish individuals who steal not only directly

from pension funds, but also indirectly through theft from an associated fund, as in this case. Reading the statute as defendant argues would not make sense based on the reality of theft from pension funds. Most thefts from pension funds are not "direct" thefts, but rather theft in some "indirect" manner, typically involving financial management agencies such as those used in this case. Congress would not have enacted a statute to punish theft from an employee pension plan, but then fall short of criminalizing the common method of committing the act. Thus, because a rational trier of fact could have found the government proved the essential elements of *Section 664*, namely theft by false pretenses from an employee pension fund by a "transfer" theory, the Court denies Shipsey's motion for a new trial based on the insufficiency of the evidence.

III. CONCLUSION

For the foregoing reason, the Court DENIES defendant's motion for new trial.

IT IS SO ORDERED

Dated: October 8, 2002

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District
Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. CR93-0624-DLJ
V.	)	**ORDER**
GEORGE MICHAEL SHIPSEY,	)	(Filed Feb. 14, 2001)
Defendant.	)	

On January 12, 2000, the Court heard argument on defendant's Motion to Dismiss the Superseding Indictment, filed November 2, 2000. Harold J. Rosenthal appeared for defendant; Lawrence J. Leigh appeared for the government. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby GRANTS the motion in part and DENIES the motion in part.

I. BACKGROUND

A. Factual Background and Procedural History

Defendant was originally charged in 1993 in a 24-count indictment. Counts 1-9 alleged that defendant violated 18 U.S.C. § 1341 (mail fraud). Counts 10-13 alleged violations of 18 U.S.C. § 1343 (wire fraud). Counts 14-20 alleged violations of 18 U.S.C. § 664 (theft by false pretenses from an employee pension plan). Lastly, Counts 21-24 alleged violations of 18 U.S.C. § 1957 (money laundering).

Defendant's jury trial began on May 20, 1997. At the conclusion of the government's case, the Court dismissed

two of the money laundering charges on defendant's motion. On June 12, 1997, the jury returned a verdict against defendant on all theft counts (Counts 14-20) and the two remaining money laundering counts (Counts 23 and 24). The jury informed the Court that it could not reach a verdict as to the wire and mail fraud counts (Counts 1-13), and the Court declared a mistrial as to those counts. On April 22, 1998, the Court sentenced defendant to 37 months of imprisonment on each count, to run concurrently.

On September 9, 1999, the Ninth Circuit reversed and remanded defendant's conviction based on an improper jury instruction.

On October 20, 2000, on defendant's motion, the Court dismissed without prejudice Counts 1-13 (mail and wire fraud) on the basis of a Speedy Trial Act violation. The government then sought re-indictment, and the grand jury returned a Superseding Indictment on November 2, 2000. The Superseding Indictment re-alleged in Counts 1-12 all but one of the thirteen original mail and wire fraud charges. The government added additional language alleging materiality of the falsehoods that were part of the scheme and artifice alleged. Counts 13-19 of the Superseding Indictment re-alleged theft by false pretenses from employee pension plans without the specific dollar amounts alleged in the original indictment. Counts 20 and 21 re-alleged money laundering.

Defendant now moves to dismiss the Superseding Indictment. The government opposes, and the motion is now before the Court.

B. Legal Standard

1. Statute of Limitations

Title 18, United States Code, Section 3288 states:

> Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment.

18 U.S.C. § 3288. The statute goes on to state that the six-month grace period does not apply in some situations. Specifically, the last sentence of 18 U.S.C. § 3288 states:

> This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.

18 U.S.C. § 3288. The Ninth Circuit has held that the "last sentence [of Section 3288] cuts off the six-month period only where the defect – whether it's a limitations problem 'or some other' problem – is not capable of being cured." *United States v. Clawson*, 104 F.2d 250, 252 (9th Cir. 1996).

2. Duplicity and Multiplicity

Federal Rule of Criminal Procedure 8(a) requires that indictments state a "separate count for each offense." *See also United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976) (duplicity is the joining in a single count of two or more distinct offenses). In addition, indictments that charge

a single offense in several different counts are invalid for multiplicity. *See United States v. Segall*, 833 F.2d 144 (9th Cir. 1987).

II. DISCUSSION

A. Statute of Limitations

1. Counts 1-12

Defendant argues that Counts 1-12 of the Superseding Indictment should be dismissed because defendant was indicted on those Counts after the statute of limitations had run. Defendant states that the most recent date set forth in the Superseding Indictment associated with unlawful activity is August 10, 1990, a date more than ten years before the Indictment date of November 2, 2000. The statute of limitations for these offenses, according to defendant, is either five or ten years. *See* 18 U.S.C. § 3282, 3293. Defendant concedes that the government has a six month "grace period" in which to re-indict where an indictment originally brought in a timely manner is dismissed after the statute of limitations has run. *See* 18 U.S.C. § 3288; *United States v. Clawson*, 104 F.3d 250, 251 (9th Cir. 1995). Defendant argues, however, that under *United States v. Peloguin*, 810 F.2d 911, 912 (9th Cir. 1987) it is clear that the six-month grace period does not apply where the dismissal occurs, as it does here, because of a violation of a Speedy Trial Act. Defendant acknowledges that Congress amended 18 U.S.C. § 3288 in 1988 to provide the six-month grace period "[w]henever an indictment or information . . . is dismissed for any reason after the period prescribed by the applicable statute of limitations had expired." 18 U.S.C. § 3288. Nevertheless, defendant insists that this amendment does not change the rule of

Peloguin and that if Congress sought to abrogate that rule and extend the scope of the six-month grace period, it would have done so expressly. Finally, defendant argues that allowing the government to avail itself of the six-month period following a Speedy Trial Act dismissal is inconsistent with the policies underlying that act.

The government responds that *Peloguin* turned on a construction of the former version of Section 3288, which read "[w]henever . . . an indictment . . . is found . . . *defective* or *deficient* for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned . . . within six months from the date of dismissal . . ." 18 U.S. C. § 3288 (1985) (emphasis added). The government argues that by amending Section 3288 to provide a six-month grace period when an "indictment . . . is dismissed *for any reason*, 18 U.S.C. § 3288 (emphasis added), Congress acted to broaden its language to include dismissals for Speedy Trial Act violations as well as for other dismissals not covered by the "defective or deficient" language in the earlier version of Section 3288. The government concedes that the current version of Section 3288 states that the grace period does not apply "where the reason for the dismissal was the failure to file the indictment . . . within the period prescribed by the applicable statute of limitations, *or some other reason that would bar a new prosecution*" (emphasis added). However, the government urges that this "last sentence [of Section 3288] cuts off the six-month period only where the defect – whether it's a limitations problem 'or some other' problem – is not capable of being cured." *United States v. Clawson*, 104 F.2d 250, 252 (9th Cir. 1996). According to the government, while a Speedy Trial Act dismissal with prejudice would have been a "problem

not capable of being cured," a Speedy Trial Act dismissal without prejudice is capable of being cured.

The resolution to this issue comes down to the question of whether the 1988 amendment of 18 U.S.C. § 3288 extends the benefit of the six-month grade period to indictments (or counts within an indictment) dismissed without prejudice under the Speedy Trial Act. The Court finds that it does. It is true that *Peloguin* stands for the proposition that § 3288 does not apply to indictments dismissed on a Speedy Trial Act violation. However, the government is correct that *Peloguin* not only dealt with a different version of Section 3288, but based its holding on that version's specific language. *Peloguin* held that where the indictment was dismissed for a Speedy Trial Act violation, Section 3288 did not apply because "the indictment was neither insufficient nor defective. It was simply out of time." *Peloguin*, 810 F.2d at 913. The current version of Section 3288 contains no language about an indictment being "insufficient" or "defective" but instead sweeps broadly to include situations where an indictment is dismissed "for any reason." 18 U.S.C. § 3288. *Peloguin*, based as it is on different statutory language, is inapplicable.

It is true that the last sentence of Section 3288 limits the broad sweep of the language just quoted, indicating that the government does not get the benefit of the six-month grace period where the reason for the dismissal was "a reason that would bar a new prosecution." 18 U.S.C. § 3288. But the government is correct that where the reason for dismissal is a violation of the Speedy Trial Act, and where the dismissal is without prejudice, that reason by definition does not bar a new prosecution. The Ninth Circuit has interpreted the last sentence of Section 3288 to

deny the government the six-month period "only where the defect – whether it's a limitations problem 'or some other' problem – is not capable of being cured." *Clawson*, 104 F.2d at 252. The "defect" of a violation of the Speedy Trial Act, where the defect results in dismissal without prejudice, can be cured by re-indictment, which was sought and obtained in this case. For these reasons, the Court finds that the six-month grace period of Section 3288 applies to this case, and that Counts 1-13 of the Superseding Indictment should not be dismissed.

2. Counts 13-21.

Plaintiff argues that the remaining counts of the Superseding Indictment should also be dismissed on statute of limitations grounds, as the Superseding Indictment was returned more than ten years after the operative events in this case. The Court agrees with the government that defendant's argument fails.

"Generally speaking, the return of an indictment tolls the statute of limitations with respect to the charges contained in the indictment." *United States v. Pacheco*, 912 F.2d 297, 305 (9th Cir. 1990) (citations omitted). If a superseding indictment on the same charges is returned while a previous indictment is still pending, and that superseding indictment does not broaden or substantially amend the charges in the original indictment, the tolling continues. *See id.; United States v. Sears*, 785 F.2d 777, 778 (9th Cir. 1986).

In this case, the 1993 Indictment tolled the statute of limitations on all undismissed counts (original counts 13-21, 23-24). The Superseding Indictment was returned on November 2, 2000 while the 1993 Indictment was still

pending as to the undismissed counts. The only changes in the new indictment appear to be (1) removal of the specific amounts of money previously alleged stolen, (2) removal of the names of several contractors, and (3) the word "material" added to counts 13-19, referring to the falsehoods that were part of the scheme and artifice. This does not appear to be a broadening of the indictment or a substantial amendment; if anything, it appears to narrow the charges. Therefore, the Court does not find a statute of limitations problem with Counts 13-21.

B. Duplicity and Multiplicity

1. Counts 13-16.

Defendant argues that Counts 13-16 should be dismissed because they violate the proscription against duplicity. Defendant points out that Counts 13-16 of the indictment do not charge theft of a specific check issued for the work of a specific subcontractor but instead charge theft of general and indeterminate amounts stolen from four separate pension trust funds over a term of years. Defendant argues that as each theft is a separate offense under 18 U.S.C. § 664, each should be in a separate count. Defendant claims that by aggregating the specific thefts at issue, defendant has been deprived of adequate notice under Due Process and, in addition, will be unable to mount any future Double Jeopardy challenges he may be entitled to bring because he will not know which specific acts are charged herein.

The Court agrees with defendant that Counts 13-16 aggregate numerous thefts from respective pension funds. However, this Court has previously ruled in this case that such aggregation does not amount to duplicity. *See* Order

of January 14, 1998 at 14-16. As the government points out, Ninth Circuit law allows prosecutors to aggregate a series of transactions into one count even though each could be prosecuted separately. *See Cohen v. United States*, 378 F.2d 751, 754 (9th Cir. 1983). The Court therefore relies on its prior ruling that the offense charged is a "scheme" to steal from an employee benefit fund and that stealing multiple checks can be part of one scheme. *See United States v. Daley*, 454 F.2d 505, 509 (1st Cir. 1972) (finding scheme of embezzlement involving multiple checks was not duplicative). Consequently, the Court denies defendant's motion on these Counts.

2. Counts 17-19

Defendant also argues that Counts 17-19 are duplicative, and that Counts 17-19 are multiplicitous of Counts 13-16. As the Court dismisses Counts 17-19 below on grounds of failure to state an offense, the Court need not address these arguments.

D. Failure to State an Offense

1. Counts 17-19 (Theft from an employee pension fund)

Defendant argues that Counts 17-19 should be dismissed because they do not state an offense. Specifically, he claims the indictment is insufficient because it states that he stole funds from "First California Mortgage Company, fund connected with an employee benefit plan," while First California Mortgage Company cannot be considered a "fund connected with an employee benefit plan" within the meaning of 18 U.S.C. § 664. Defendant relies upon *United States v. Bell*, 22 F.3d 274 (11th Cir.

1994), which holds that allegations under § 664 of stealing from a fund "connected with" an ERISA-related fund are insufficient unless the fund is specifically governed by ERISA. *Id.*, 22 F.3d at 276. Here, defendant argues, First California is not a fund specifically governed by ERISA, and is in fact not a "fund" at all, but rather a general financial institution.

The government responds by asserting that First California should be considered a fund "connected" with an employee benefit plan for the purposes of § 644. *See* 18 U.S.C. § 664 (proscribing thefts from any "employee pension benefit plan . . . or any fund connected therewith. . . ."). The government explains that it intends to show at trial that First California advanced money to defendant as the Pension Fund's agent to cover costs of the Stonefield Condominium Project, a project financed by the Pension Funds. Therefore, the government argues, First California acted as a "fund" connected with the Pension Funds at issue.

The Court agrees with defendant that Counts 17-19 fail to state an offense. The Court adopts the reasoning of *Bell*, which emphasized that there is no indication in the legislative history of § 664 that the statute was intended to apply to any funds other than those governed by ERISA. *Bell*, 22 F.3d at 276.

The government asserts that the plain meaning of the language "fund connected therewith" in the statute can apply to cash advances offered by a financial institution out of its own accounts when it acts as an agent for an employee pension fund. The Court finds this argument untenable. First California is a financial institution, not a "fund." To adopt the government's definition would so

broaden § 664 as to bring within its scope a plethora of financial transactions merely indirectly connected with a pension fund. Counts 17-19 are therefore properly dismissed.

2. Counts 20-21 (Money Laundering)

Defendant argues that Counts 20-21 should be dismissed on the grounds that they allege the laundering of money obtained in violation of 81 U.S.C. § 664, when in fact, as explained above, the government states no offense with respect to that statute, as it alleges theft from First California, which is not properly considered an employee benefit fund or a "fund connected therewith." As the analysis of this argument depends directly on defendant's argument as to Counts 17-19, which the Court found persuasive, the Court grants defendant's motion to dismiss with respect to Counts 20 and 21.

III. CONCLUSION

For the foregoing reasons, the Court hereby DENIES defendant's motion to dismiss Counts 1-16 and GRANTS defendant's motion to dismiss Counts 17-21 of the Superseding Indictment.

IT IS SO ORDERED

Dated: February 14, 2001

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GEORGE MICHAEL SHIPSEY, Defendant-Appellant.	No. 02-10651 D.C. No. CR-93-00624-DLJ ORDER (Filed Jun. 23, 2004)

Before: HALL and GRABER, Circuit Judges, and WEINER,* Senior District Judge.

The panel has voted to deny the petition for rehearing. Judge Graber has voted to deny the petition for rehearing en banc and Judges Hall and Weiner have so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

* The Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.